

## Dechter, Mike -FS

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**From:** Van Gilder, Margaret -FS on behalf of FS-appeals-southwestern-regional-office  
**Sent:** Tuesday, April 09, 2013 6:45 AM  
**To:** Dechter, Mike -FS  
**Cc:** Stewart, Earl -FS; Russell, Scott A -FS  
**Subject:** FW: 215 APPEAL: Glen Canyon-Pinnacle Peak Transmission Lines Vegetation Project  
**Attachments:** CBD\_appeal\_GlenCanyon-PinnaclePeak345kV\_DN-FONSI\_040513.pdf;  
Forest\_owl\_chart\_updated\_2009.pdf; BO 20050610 FS LRMP BO FINAL 6-10-05 ANNUAL  
REPORT 200810 Annual Report\_Final\_October\_2008.pdf

Here's an appeal from CBD on the Glen Canyon-Pinnacle Peak transmission line veg management project.

Mike, please verify comments were submitted and supply the legal notice. Thanks!

~Margaret

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**From:** Jay Lininger [<mailto:jlininger@biologicaldiversity.org>]  
**Sent:** Friday, April 05, 2013 9:41 PM  
**To:** FS-appeals-southwestern-regional-office  
**Subject:** 215 APPEAL: Glen Canyon-Pinnacle Peak Transmission Lines Vegetation Project

Good day!

Please find attached to this message and pasted below an appeal from the Center for Biological Diversity under 36 CFR 215 of the February 22, 2013 Decision Notice and Finding of No Significant Impact for the Glen Canyon-Pinnacle Peak 345-kV Transmission Lines Vegetation Management Project. Two more items referenced in the appeal are attached for inclusion in the project record.

Thank you,

Jay Lininger, Ecologist  
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**Via Web**

April 5, 2013

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**Appeal of Glen Canyon-Pinnacle Peak 345-kV Transmission Lines Vegetation Management Project Decision Notice and Finding of No Significant Impact**

Pursuant to 36 C.F.R. Part 215, the Center for Biological Diversity (“Center”) appeals the Decision Notice (“DN”) and Finding of No Significant Impact (“FONSI”) for the Glen Canyon-Pinnacle Peak 345-kV Transmission Lines Vegetation Management Project (“project”) in the Coconino National Forest. Legal notice of the decision appeared in the *Arizona Daily Sun* newspaper on March 5, 2013, making this appeal timely per 36 C.F.R. § 215.15. The Center commented on the Environmental Assessment (“EA”) and may appeal. *Id.* § 215.13; DN at 14.

The decision to implement the project violates standards and guidelines of the Coconino National Forest Land and Resource Management Plan (“Forest Plan”) for threatened Mexican spotted owl. More, the decision fails to ensure that the project will avoid jeopardizing the continued existence of Mexican spotted owl. In addition, the EA fails to take a hard look at effects of the project to wildlife species whose viability the Forest Service is obligated to maintain. For these reasons, the decision violates the National Forest Management Act, the Endangered Species Act, and the National Environmental Policy Act.

TITLE OF DECISION: Decision Notice and Finding of No Significant Impact for the Glen Canyon-Pinnacle Peak 345-kV Transmission Lines Vegetation Management Project.

DATE OF DECISION: February 22, 2013.

DECIDING OFFICIAL: Earl Stewart, Coconino Forest Supervisor.

DESCRIPTION: Vegetation management on up to 4,580 acres. *See* EA at 2-1.

LOCATION: Coconino and Yavapai Counties, Arizona.

**APPELLANT’S INTEREST**

The Center for Biological Diversity is a nonprofit organization headquartered in San Francisco, California, with offices Flagstaff and Tucson, Arizona, and in Albuquerque, New Mexico. Its mission is to protect and promote recovery of imperiled fauna and flora and wild places through science, education, policy, and law. The Center has approximately 500,000 members and online activists, many of whom reside in Arizona. Its members and staff regularly use and enjoy, and will continue to use and enjoy the forest, woodlands, grasslands, and riparian habitats located in the project area for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities. Members and staff of the Center have and shall continue to research, study, observe, and seek protection for at-risk species associated with natural habitats found in the Coconino National Forest. Members and staff of the Center also derive scientific, recreational, conservation and aesthetic benefits from the existence of the full complement of native biological diversity found in the wild. Forest Service violations of law in the project may cause significant adverse impacts to threatened species and/or management indicator species in violation of applicable laws.

## MOTION FOR STAY

An automatic stay of implementation is in effect per 36 C.F.R. § 215.9. Appellant moves to stay implementation of all actions authorized by the DN and FONSI. A stay of all actions subject to this motion is needed to prevent irretrievable commitment of environmental resources, harm to appellant's interests, and expenditure of public funds in violation of federal law. A stay will maintain the status quo.

### RELIEF SOUGHT

1. Withdraw the DN and FONSI authorizing the project.
2. Respond to issues described in the statement of reasons below by modifying the environmental analysis and decision as appropriate.
3. Prepare an environmental impact statement or supplemental EA to disclose potentially significant effects that may result from the project.
4. Reinitiate consultation with the U.S. Fish and Wildlife Service under Section 7 of the Endangered Species Act to obtain an incidental take permit for threatened Mexican spotted owls that will be affected by the project.

### STATEMENT OF REASONS

#### I. Project violates forest plan standards and guidelines for threatened Mexican spotted owl.

The project violates the Coconino Forest Plan for three reasons. First, the Forest Service relied on information about threatened Mexican spotted owl that is more than 10 years old and failed to survey or monitor for owl presence or activity in the project area. Second, the project will remove large trees from Protected Activity Centers (PAC) and nest core areas that were known at one time to be occupied by Mexican spotted owl. Finally, the project fails to meet guidelines for the retention of forest structure in Restricted Habitat of Mexican spotted owl outside of PAC. The Decision Notice does not amend the Coconino Forest Plan. For these reasons, the decision to implement the project violates the National Forest Management Act (NFMA) and it is arbitrary and capricious.

#### A. Surveys

The Coconino Forest Plan contains standards requiring survey of "all potential spotted owl areas including protected, restricted, and other forest and woodland types within an analysis area plus the area 1/2 mile beyond the perimeter of the proposed treatment area." Forest Plan at 65. The project area contains approximately 27,518 acres of Mexican spotted owl habitat. *See* EA at 3-35. Of these, 1,079 acres are located within project area "rights-of-way," and 610 acres are located within the 60-foot-wide "potential danger tree areas" adjacent to rights-of-way. *Id.*

Critical Habitat is present within the study area along two stretches of the alignment. The northernmost is an 11-mile segment that runs from FR 124D near Pouroff Tank, to where the alignment crosses FH (Forest Highway) 3 (Lake Mary Rd) approximately 2 miles south of Happy Jack. The southernmost is a 7-mile segment that runs from Island and Road Tanks (near the junction of FRs 81A and 755) to where the Project area crosses SR 260.

Within these areas of Critical Habitat, there are 9 PACs within the study area (Figure 3-4). From north to south, the PACs that may be impacted are Sawmill Springs, Spruce Tank, Powerline Tank, Boondock, Schell Springs, Little Water, Power, Cash, and Meadow Canyon. Of these, only Boondock, Cash, and Meadow Canyon have

portions of their core area that may be impacted. Table 3-8 shows the acres of Critical Habitat and PACs within the rights-of-way, danger tree area, and study area.

*Id.* at 3-36; *also see id.* 3-40 (approximately four miles of the “project area alignments” are located within PAC and 19.5 miles are within critical habitat).

The distribution of Mexican spotted owl in the project area is unknown because the record contains no evidence of surveys to determine presence or activity of the species. On December 19, 2011, the Center submitted with comments on the EA a chart created by the Forest Service demonstrating that no survey information existed for any PAC in the project area from 2002-2009, and in some cases, there was no information from as early as 1993 or 1994 (*i.e.*, Cash and Meadow Canyon PACs, respectively).<sup>[1][1]</sup> Indeed, the EA states that no consistent monitoring of spotted owl populations has been accomplished in the Coconino National Forest:

As of 2002, there were 179 known PACs within [Coconino National Forest]. Population trend data for Mexican spotted owls is inconclusive. Consistent monitoring has not been conducted over a long enough period of time to allow for reliable trend information.

*Id.* The record fails to demonstrate that the Forest Service complied with the mandatory plan standard to survey for spotted owls in the project area, and indicates that the agency is in ongoing violation of the standard to “Monitor changes in owl populations and habitat needed for delisting.” Forest Plan at 65-1.

## B. Protected Habitat

According to the EA, the project will remove large trees from within PAC and nest core areas that at one time were known to be occupied by Mexican spotted owl.

Impacts to Mexican spotted owl habitat would occur as a result of Project-related activities. This includes areas within PACs, potentially within the core areas. Within PACs, work would not occur between March 1 and August 31. This would avoid the courtship, breeding, nesting, and fledging periods. Additionally, use of loud machinery within 0.25 mile of the PACs would not occur during this period. Exceptions to this would be if it were found that there is a hazardous situation that could result in interrupted service of the transmission line(s) in which case PCM #30 would apply (see Table 2-2).

EA at 3-43. Table 2-2 in the EA contains “project conservation measure” number 33, which states: “It is recommended that trees > 24 inches diameter at breast height within PACs be retained unless over-riding management situations require their removal to protect human safety and/or property (for example, the removal of danger trees along power lines)” [emph. added].<sup>[2][2]</sup>

Clearly, the Forest Service anticipates that trees larger than 24-inches diameter will be removed from PAC, and this activity may directly affect nest cores in the Boondock, Cash and Meadow Canyon PAC. The decision to implement the proposed action violates plan guidelines that permit only the removal of conifers smaller than 9-inches diameter from PAC and prohibit treatments in core areas:

Harvest conifers less than 9 inches in diameter only within those protected activity centers treated to abate fire risk as described below, **except for the Clark PAC where trees less than 16 inches diameter will be harvested.**

Treat fuel accumulations to abate fire risk.

--Select for treatment 10% of the protected activity centers where nest sites are known in each recovery unit having high fire risk conditions. Also select another 10% of the protected activity centers where nest sites are known as a paired sample to serve as control areas.

--Designate a 100 acre "no treatment" area around the known nest site of each selected protected activity center. Habitat in the no treatment area should be as similar as possible in structure and composition as that found in the activity center.

Forest Plan at 65-2 [emph. original]. These forbidden activities may affect 73.21 acres of PAC in "rights-of-way," and 39.17 acres of PAC in "danger tree areas." *See* EA at 3-38 (Table 3-8).

### **C. Restricted Habitat**

Restricted Habitat suitable for Mexican spotted owl nesting and roosting outside of PAC may be directly affected on 484.56 acres of project area "rights-of-way," and 184.08 acres of "danger tree areas." *Id.* As above, project-specific mitigation measures for Mexican spotted owl state, "It is recommended that trees > 24 inches diameter at breast height be retained unless over-riding management situations require their removal to protect human safety and/or property (e.g., the removal of hazard trees along power lines)." *Id.* at 3-41 (Table 3-9) [emph. added]. The project clearly deviates from Coconino Forest Plan guidelines requiring that activities in Restricted Habitat must "Save all trees greater than 24 inches dbh." Forest Plan at 65-4; *also see* EA at 1-21. The plan contains no exceptions.

## **II. Failure to avoid jeopardy to Mexican spotted owl.**

The decision to implement the project fails to avoid jeopardizing the continued existence of threatened Mexican spotted owl, in violation of the Endangered Species Act ("ESA"). This failure stems from three factors:

- (1) The Forest Service has failed to survey for Mexican spotted owl or monitor populations in violation of the Coconino Forest Plan and the 1995 Recovery Plan.
- (2) The Forest Service will not implement the project in compliance with standards and guidelines of the Coconino Forest Plan for protected and restricted habitats.
- (3) The project is reasonably certain to cause incidental take of Mexican spotted owl, but the Forest Service failed to obtain authorization from the U.S. Fish and Wildlife Service ("FWS") to incidentally take owls in the specific PAC that will be affected by the project.

On July 17, 2008, the FWS issued a biological opinion concluding formal consultation with the Forest Service under Section 7 of the ESA on effects of vegetation management activities in transmission line corridors that are likely to adversely affect Mexican spotted owl and its critical habitat (USDI 2008). In that opinion, the FWS authorized incidental take of spotted owls at each of 16 Protected Activity Centers (USDI 2008: 61) (authorizing incidental take in six PACs on the Coconino National Forest); *also see* USDI (2008: 60) ("The current section 7 consultation guidance provides for incidental take if an activity compromises the integrity of a PAC. Actions outside PACs will generally not be considered to result in incidental take of owls, except in cases when areas that may support owls have not been adequately surveyed and we are reasonably certain incidental take could occur."). The FWS further stated in its biological opinion:

Based on the best available information concerning the MSO, habitat needs of the species, the project description, and information furnished by the FS, take is anticipated for the MSO as a result harm and/or harassment from the following actions:

- Vegetation removal actions that modify key habitat components and may result in degraded nesting, roosting, and foraging habitat [...]

[...]

- Hazard removal and disposal of vegetation during the breeding season within or near MSO PACs, causing disturbance to owls that could result in flush responses or decreased prey delivery/feeding.

USDI (2008: 61). None of the 16 PACs where the FWS authorized incidental take in connection with activities related to the proposed action, including six PAC on the Coconino National Forest, will be affected by the project at appeal. However, the FWS acknowledged,

While it is possible that incidental take could occur to owls associated with the other 62 PACs within the action area, it is difficult to predict where impacts from the proposed action may actually occur in order to anticipate incidental take with any reasonable certainty. Incidental take identified with this action will be confirmed and/or modified by yearly reports. Though we have attempted to clearly identify the PACs where incidental take is expected, the scale and temporal components of this project do not allow for a precise accounting of exactly which owls may be taken by the proposed action. However, if yearly reports indicate that incidental take may differ from the 16 PACs named above, we will work with the FS to determine whether we need to modify the list of PACs where incidental take of MSO actually occurred or whether reinitiation is necessary.

USDI (2008: 62) [emph. added]. The instant action is precisely the circumstance that FWS anticipated requiring reinitiated consultation because it noted that the Forest Service had not provided adequate information to determine that take would occur anywhere other than the 16 PAC included in the Incidental Take Statement of July 17, 2008. The record demonstrates that incidental take is reasonably certain to occur in at least three and as many as nine PAC within the project area. The Forest Service has failed to obtain the required authorization of incidental take from FWS and therefore must reinitiate consultation to avoid jeopardizing Mexican spotted owl.

The Forest Service admitted in an October 2008 “Annual Report” that it failed to monitor spotted owl populations as required and exceeded the incidental take authorized by the FWS in a 2005 biological opinion on the continued implementation of forest management plans.<sup>[3][3]</sup> According to the Forest Service, personnel and funding were inadequate to meet the monitoring requirements set out in Term and Condition 3.1 of the June 10, 2005, Incidental Take Statement.

On April 17, 2009, the Forest Service requested re-initiation of formal consultation on effects of implementing the Coconino Forest Plan on Mexican spotted owl and its critical habitat. According to that letter, “[i]t has now become apparent that the Forest Service will likely soon exceed the amount of take issued for at least one species, the Mexican spotted owl.” More, “it has become apparent that the Forest Service is unable to fully implement and comply with the monitoring requirements associated with the Reasonable and Prudent Measures for several species (including MSO) in the [biological opinion].”

The FWS accepted the Forest Service’s request of April 17, 2009, to reinitiate consultation and issued a new biological opinion regarding continued implementation of the Coconino Forest Plan on March 30, 2012 (USDI 2012). The newest biological opinion authorizes incidental take in the form of “harm and/or harassment of MSOs associated with two PACs due to long-term or chronic disturbance, or habitat degradation or loss over the life of the project” (USDI 2012: 27). The project at appeal will exceed that level of incidental take in at least three and as many as nine PAC. Therefore, the Forest Service’s decision to implement the project and its failure to reinitiate consultation present two independent violations of Section 9 of the ESA.

The March 30, 2012 biological opinion (USDI 2012) eliminates the requirement of the June 10, 2005, Incidental Take Statement to monitor Mexican spotted owl populations and replaces it with a more modest requirement to monitor and report take resulting from direct effects of PAC disturbance. Compliance with new terms and conditions for monitoring owls in the March 30, 2012 opinion does not meet the Forest Service’s

independent obligation under the Coconino Forest Plan and NFMA to “Monitor changes in owl populations and habitat needed for delisting.” Forest Plan at 65-1.

### **III. Failure to take hard look at effects to management indicator species.**

The Forest Service is required to maintain viable populations of management indicator species (“MIS”) designated by the Coconino Forest Plan. *See Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957 (9th Cir. 2002). The “indicator” function is to act as a proxy for other species that associate with similar habitat. To maintain viable populations, the Forest Service must obtain and analyze population data (actual numbers and trend). Regulations implementing the NFMA require evaluation of site-specific actions affecting MIS “in terms of both the amount and quality of habitat and of animal population trends...” 36 C.F.R. § 219.19(a)(2) (1982). The Forest Service also must use MIS population data to determine how changes relate to site-specific actions. *See id.* § 219.19(a)(6); *also see Forest Guardians v. U.S. Forest Serv.*, 180 F. Supp. 2d 1273 (D.N.M. 2001) (population data on MIS is required in site-specific assessment of management actions).

In the Ninth Circuit, the Forest Service can designate specific types and quantities of habitat as an additional proxy for viable populations. Habitat can be monitored to determine what population changes, if any, may result from management. The agency may use this “proxy on proxy” approach to avoid acquisition and analysis of MIS population data. However, this limited exception to the viability requirement is permissible only if the habitat methodology applied by the agency “reasonably ensures” that viable populations are maintained. *Idaho Sporting Cong.*, 305 F.3d 961.

The project area covers 10 distinct potential natural vegetation types and overlaps 18 Management Areas designated by the Coconino Forest Plan. Therefore, the NFMA requires the Forest Service to maintain viable populations of 17 management indicator species, including Mexican spotted owl.

Forest-wide habitat and population trends of MIS are relevant to the analysis of environmental impact in this project. But the EA contains no information on forest-wide MIS habitat or population trends. The EA states that no consistent monitoring of Mexican spotted owl populations has been accomplished in the Coconino National Forest:

As of 2002, there were 179 known PACs within CNF. Population trend data for Mexican spotted owls is inconclusive. Consistent monitoring has not been conducted over a long enough period of time to allow for reliable trend information.

EA at 3-36. Similarly, with respect to red squirrel, a late-seral obligate in mixed conifer forest, “The population trend for red squirrels within Coconino National Forest is inconclusive due to lack of information.” *Id.* at 3-22. The EA contends that the project will have “little to no effect to the forest-wide population trend or its indicator habitat.” *Id.* at 3-29. However, that conclusion is arbitrary because the Forest Service never studied forest-wide population trends.

The Forest Service also failed to take a hard look at cumulative effects of the project to management indicator species. The EA contains no information about foreseeable cumulative effects resulting from the Upper Beaver project (Decision Notice 3/25/10), the Marshall project (Decision Notice 1/27/11), the Clints Well project (Decision Notice 2/6/2013) or the Four Forest Restoration Initiative Project (Notice of Intent 1/25/2011). *See* EA at 3-3 to 3-4 (Table 3-1). All of those projects overlap or are located in close proximity to the project at appeal. Therefore, the decision to implement the project violates the Coconino Forest Plan, the NFMA, and the National Environmental Policy Act.

### **Conclusion**

For the reasons given above, the Center urges the Forest Service to withdraw the DN and FONSI authorizing the project and provide meaningful remedies as described in the request for relief above.

Sincerely,



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Att.

## REFERENCES

USDI Fish and Wildlife Service. 2008. *Biological Opinion on Phase II Utility Maintenance in Utility Corridors on Arizona Forests*. Cons. # 22410-2007-F-0365. Phoenix, AZ. July 17. 103 pp.

\_\_\_\_\_. 2012. *Biological and Conference Opinion on the Continued Implementation of the Land and Resource Management Plan for the Coconino National Forest of the Southwestern Region*. Cons. # 2012-F-0004. Albuquerque, NM. March 30. 196 pp.

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<sup>[1][1]</sup> See “Mexican Spotted Owl PAC Monitoring Chart - Coconino National Forest,” attached to this appeal for convenience.

<sup>[2][2]</sup> “Project conservation measure” number 33 is a new convention of the EA and it was not proposed or recommended by the U.S. Fish and Wildlife Service in its July 17, 2008 biological opinion regarding effects of transmission line activities to Mexican spotted owl. See USDI (2008: 14).

<sup>[3][3]</sup> USDA Forest Service. 2008. *Annual Report Covering the Period June 10, 2005 – June 10, 2007, Programmatic Biological Opinion on the Land and Resource Management Plans for the 11 National Forests in the USDA Forest Service Southwestern Region*. Albuquerque, NM. October. 110 pages.